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IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF OREGON

CHRISTOPHER WIMBERLY,  
  
Petitioner,

02-CR-195-BR  
(04-CV-254-BR)

OPINION AND ORDER

v.

UNITED STATES OF AMERICA,  
  
Respondent.

**CHRISTOPHER WIMBERLY**

Reg. No. 66433-065  
Federal Correctional Complex, Victorville I  
P.O. Box 5300  
Adenanto, CA 92301

Petitioner, *Pro Se*

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United States Attorney

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Attorneys for Respondent

**BROWN, Judge.**

This matter comes before the Court on Petitioner Christopher Wimberly's Motion for Reconsideration (#85).

For the reasons that follow, the Court **GRANTS** Petitioner's Motion for Reconsideration and, having reconsidered the merits of Petitioner's arguments, the Court **DENIES** Petitioner's request for the Court to alter or to amend its January 21, 2005, Opinion and Order denying Petitioner's Motion to Vacate, Set Aside or Correct Sentence pursuant to 28 U.S.C. § 2255.

#### **BACKGROUND**

On June 6, 2002, the government issued a Superseding Indictment charging Petitioner with one count of Felon in Possession of a Firearm in violation of 18 U.S.C. § 922(g)(1). On November 20, 2002, Petitioner pled guilty to the one count.

Under the terms of the Plea Agreement, the government and Petitioner agreed to a Total Offense Level of 17 under the United States Sentencing Guidelines. The government agreed to recommend a sentence at the low end of the guideline range of 51-63 months and to recommend Petitioner's sentence "run concurrently with his state sentence for Unlawful Use of a Motor Vehicle."

On March 19, 2003, the Court sentenced Petitioner to a term of 49 months imprisonment after crediting Petitioner with two months for time served relating to "the conduct which gave

rise to the crime of conviction in this case." The Court, however, did not follow the parties' recommendation for a concurrent sentence. The Court instead ordered Petitioner's federal sentence to be served consecutive to the undischarged term of imprisonment for Petitioner's state conviction.

On February 17, 2004, Petitioner filed a Motion to Vacate or Correct Sentence Under § 2255. On September 27, 2004, Petitioner filed a Supplemental Motion to Vacate or Correct Sentence. In its Opinion and Order issued January 21, 2005, the Court denied both Motions. Among other things, the Court denied Petitioner's claim for ineffective assistance of counsel in which Petitioner alleged his counsel was ineffective because he failed to challenge the Presentence Investigation Report (PSR) on the ground that it reflected a prior Oregon state conviction for Unlawful Use of a Weapon as a crime of violence. At sentencing, the Court noted a Marion County Circuit Court jury found Petitioner guilty of Unlawful Use of a Weapon in violation of Or. Rev. Stat. § 166.220 following a trial, and Petitioner's conviction was affirmed on appeal. The Court further noted the Ninth Circuit earlier held a prior conviction based on an unlawful use of a weapon in violation of Or. Rev. Stat. § 166.220 was a crime of violence that justified enhancement of the defendant's sentence from a Base Offense Level of 14 to a Base Offense Level of 20. See *United States v. Terry-Crespo*, 356 F.3d

1170, 1177-78 (9<sup>th</sup> Cir. 2004). Accordingly, this Court concluded Petitioner was not prejudiced by his counsel's failure to raise the issue as to whether Petitioner's prior conviction was a crime of violence because Petitioner could not have met his burden under *Strickland v. Washington* to establish at sentencing that there was a reasonable probability the result of the proceeding would have been different. See 466 U.S. 668, 678, 694 (1984). On February 22, 2005, Plaintiff filed a Notice of Appeal.

On March 8, 2005, Petitioner filed a Motion for Reconsideration of the Court's January 21, 2005, Opinion and Order. The Court denied Petitioner's Motion for lack of jurisdiction pending appeal. On June 10, 2005, the Ninth Circuit dismissed Petitioner's appeal.

On November 21, 2005, Petitioner filed a Motion for Reconsideration of the Court's January 21, 2005, Opinion and Order on the ground that the Court erroneously enhanced his sentence based on information in the PSR derived from a police report describing Petitioner's unlawful use of a weapon. Petitioner alleges the use of such information for this purpose is prohibited by *Shepard v. United States*, 125 S. Ct. 1254 (2005).

### **DISCUSSION**

In *Shepard*, the Supreme Court addressed the issue whether a

"sentencing court can look to police reports or complaint applications to determine whether an earlier guilty plea necessarily admitted, and supported a conviction for, generic burglary" in states with broader burglary definitions for purposes of sentence enhancement under the Armed Career Criminal Act (ACCA), 18 U.S.C. § 924(e). *Id.* at 1257. The defendant was charged in the state court complaints with offenses that were broader than generic burglary. Because the defendant pled guilty to the charges, "there were . . . no jury instructions that might have narrowed the charges to the generic limit." *Id.* at 1258. The government urged the district court to examine reports submitted by the police and "applications of issuance of complaints" to determine whether the defendant pled guilty to generic burglary. *Id.* The district court declined to do so based on the Supreme Court's decision that a sentencing court could "'look only to the fact of conviction and the statutory definition of the prior offense.'" *Shepard*, 125 S. Ct. at 1258 (quoting *Taylor v. United States*, 495 U.S. 575, 602 (1990)). The First Circuit reversed the district court's decision. The Supreme Court subsequently reversed the First Circuit and affirmed the district court. Although the Supreme Court rejected the government's contention that the sentencing judge may "go[] beyond conclusive records made or used in adjudicating guilt and look[] to documents submitted to lower courts even prior to

charges," the Supreme Court held "guilty pleas [and convictions in tried cases] may establish ACCA predicate offenses and . . . *Taylor's* reasoning controls the identification of generic convictions following . . . convictions on verdicts." *Id.* at 1259-60.

The facts of this case, however, are distinguishable from *Shepard*. The sentencing court in *Shepard* did not have any information other than the police reports to assist it in determining whether the defendant's conviction met the criteria of a general offense. Here Petitioner was tried and convicted by a jury of Unlawful Use of a Weapon in violation of Or. Rev. Stat. § 166.220. In addition, as noted, the Ninth Circuit has held a prior conviction based on the unlawful use of a weapon in violation of Or. Rev. Stat. § 166.220 is a crime of violence that justifies enhancement of a defendant's sentence. *Terry-Crespo*, 356 F.3d at 1177-78. Thus, under both *Taylor* and *Shepard* and in light of *Terry-Crespo*, Petitioner's conviction for Unlawful Use of a Weapon in violation of Or. Rev. Stat. § 166.220 is a proper basis for enhancing Petitioner's sentence. Even if this Court relied on information in the PSR that was taken from a police report, the Court also had additional information sufficient to provide a proper basis for enhancing Petitioner's sentence. The Court, therefore, declines to alter or to amend its Opinion and Order issued January 21, 2005 , denying Petitioner's Motion to

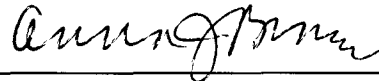
Vacate, Set Aside or Correct Sentence pursuant to § 2255.

**CONCLUSION**

For these reasons, the Court **GRANTS** Petitioner Eduardo Martinez Wimberly's Motion for Reconsideration (#85), and, having reconsidered the merits of Petitioner's arguments, the Court **DENIES** Petitioner's request for the Court to alter or to amend its January 21, 2005, Opinion and Order.

IT IS SO ORDERED.

DATED this 27<sup>th</sup> day of February, 2006.



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ANNA J. BROWN  
United States District Judge